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No. 93-1722

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JACQUELINE R. MORGAN

Petitioner,

v.

JOHN S. FORD, *ET AL.*

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE WOMEN'S LEGAL DEFENSE FUND, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

(Additional *Amici Curiae* listed on inside cover)

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QUESTION PRESENTED

Whether a public employee's speech that addresses a "matter inherently of public concern" and hence is entitled to First Amendment protection may lose that protection altogether because of the employee's personal stake in the subject of the speech.

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are public interest advocacy organizations and labor unions dedicated to, *inter alia*, advancing the employment rights of women. They litigate and educate the public to improve equal opportunity for women and other historically

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[1] Pursuant to Rule 37.3 of the Rules of this Court, letters indicating the written consent of all parties to the filing of this brief are being lodged with the Court.

disadvantaged groups in employment, education, and other areas of public interest.[2]

This case is of great interest to *amici* because hostile environment harassment remains a potent barrier to women's equal access to the workplace. The decision below implicates both the First Amendment and the nation's commitment against sexual harassment in the workplace. It presents an important question of widespread practical importance that has split the circuits: Whether a public employee's speech that addresses a "matter inherently of public concern" and hence is entitled to First Amendment protection may lose that protection altogether because of the employee's personal stake in the subject of the speech.

Amici urge the Court to grant *certiorari* to the Eleventh Circuit to resolve this question.

STATEMENT OF THE CASE

Petitioner was employed as a correctional officer with the Georgia Department of Corrections from 1984 until 1988, when she resigned. While a public employee, she was subjected to acts of sexual harassment. *Morgan* v. *Ford*, 6 F.3d 750, 752, 756 (11th Cir. 1993). When a co-employee complained about the same subject and identified petitioner as a corroborating witness, she was questioned. She corroborated the other employee's complaints and also detailed the harassment she had suffered. Petitioner was advised to pursue her complaints through internal channels and she did so. *Id.* at 752. The department's investigators ruled against her

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[2] Individual statements of interest of the *amici* are attached as Appendix A to this brief.

claim, after which she was subjected to retaliation for having complained. *Id.* at 752-3, 756.

Petitioner brought this action under Title VII seeking reinstatement and back pay. She also charged that her supervisors had violated her First Amendment rights by retaliating against her for her speech challenging their sexual harassment. The district court granted defendants' motion for summary judgment on all counts. The Eleventh Circuit reversed the district court on the Title VII claim but affirmed on the First Amendment claim.[3] It held that, although "the general subject of sexual harassment in the workplace is a matter of public concern," *id.* at 755 n.7, and thus ordinarily protected by the First Amendment, petitioner's speech was entitled to no First Amendment protection whatsoever. Construing *Connick* v. *Myers*, 461 U.S. 138 (1983), and *Rankin* v. *McPherson*, 483 U.S. 378 (1987), the court held that it "must . . . discern the purpose of the employee's speech — that is, whether she spoke on behalf of the public as a citizen, or whether the employee spoke for herself as an employee." *Id.* at 754. Even the fact that petitioner corroborated her co-worker's account of sexual harassment did not result in First Amendment protection because, in the court's view, "the main thrust of her speech took the form of a private employee grievance." *Id.* at 755. The court thus used the "context and form" of petitioner's speech to take away the First Amendment protection that attached to it under *Connick* because of its content.

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[3] Morgan's surviving Title VII claim does not vindicate her right to be free from punishment under color of law for exercising her First Amendment right to speak out on constitutional and statutory violations by State officials.

REASONS FOR GRANTING THE WRIT

A public employee has a First Amendment claim against her employer under 42 U.S.C. § 1983 when the employer has punished her for speech if (1) she spoke on a matter of public concern, (2) her interests in speaking outweighed the government's interest as employer in limiting that speech, and (3) her speech played a "substantial part" in the government's adverse actions against her. *Rankin* v. *McPherson*, 483 U.S. at 384; *Connick* v. *Myers*, 461 U.S. at 150; *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410, 416 (1979); *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968).[4]

The first step in this analysis — the only point involved in this case — is to determine whether the statement addresses a matter of "public concern" and thus warrants protection under the First Amendment. *Connick*, 461 U.S. at 146. On this issue, the courts of appeals are in hopeless disarray, primarily because the pertinent opinions of this Court lend themselves to conflicting interpretations.

I. *CONNICK* AND *RANKIN* ESTABLISH THAT SPEECH WHICH IS INHERENTLY OF PUBLIC CONCERN IS ENTITLED TO FIRST AMENDMENT PROTECTION.

Under *Connick*, speech by a public employee is entitled to First Amendment protection if it meets one of two tests. The first applies if the subject matter of the speech is "inher-

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[4] She may be denied a remedy, however, if her employer proves that it would have taken the adverse action in the absence of her speech. *Mt. Healthy City School District Bd. of Educ.* v. *Doyle*, 429 U.S. 274 (1977).

ently of public concern," even if communicated privately; race discrimination — and presumably sexual harassment — is such a subject. *Id.* at 148 n.8. When the subject is not *inherently* of public concern because of its *content*, the speech may nonetheless be entitled to protection because of its *form* or *context*. *Connick* involved a questionnaire that sought opinions of co-workers in a district attorney's office about how the office was run. The Court held that most of the questionnaire did not involve public concern, either because of its *content* or its *form* or *context*. But a question that dealt with whether employees "ever feel pressured to work in political campaigns" was held to raise a matter of public concern because of its *content*, even though its *form* and *context* were identical to the questions that did not raise a matter of public concern.

Rankin applied the "content, form, and context" analysis developed in *Connick*. The statement at issue was an expression of hope by an African American public employee that, if another attempt were made to assassinate President Reagan, it might succeed. Although the *content* of the statement was not entitled to First Amendment protection, the Court found that the statement was made in the *context* of a discussion of that president's policies and how they affected African Americans. Thus, the Court held that the employee's statement addressed a matter of public concern because it satisfied one of the three elements of the Connick test.

II. THE CIRCUITS APPLY CONFLICTING INTERPRETATIONS OF *CONNICK* AND *RANKIN*.

There is no suggestion in either *Connick* or *Rankin* that speech which, by content or subject matter alone, would be of public concern can lose First Amendment protection because of its context or form. Yet that is exactly what some

courts of appeals, including the Eleventh Circuit in this case, have held. Other circuits, however, have rejected this interpretation of *Connick* and *Rankin*.

Two courts of appeals have acknowledged this split in the circuits. In *O'Connor* v. *Steeves*, 994 F.2d 905, 913-14 & nn.4 & 5 (1st Cir.), *cert. denied*, 114 S. Ct. 634 (1993), the court stated that "[t]he courts of appeals have adopted various approaches for determining whether a topic of employee speech is of 'public concern,'" with some circuits employing a "contextual" approach and others employing a "content-based" approach. See also *Woodward* v. *City of Worland*, 977 F.2d 1392, 1404 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 3038 (1993); Comment, *Beyond "Public Concern": New Free Speech Standards for Public Employees*, 57 U. Chi. L. Rev. 249, 258-62 (1990) (describing the splintering of the circuits).

Under the "contextual" approach, followed by the Eleventh Circuit in this case, even if a public employee speaks on a matter that is inherently of public concern, the form and context of the statement may transform that speech into speech solely of private concern, contracting the scope of First Amendment protection. Under the "content-based" approach, no examination of form or context is made if the content or subject matter of the speech is inherently of public concern.

A. Three Circuits Hold That Speech Which Is Inherently of Public Concern May Lose Its First Amendment Protection Because of Its Form or Context.

The court in this case drew support for its analysis from the statement in *Connick* that there is no First Amendment

protection when "a public employee speaks *not* as a citizen upon matters of public concern, but *instead* as an employee upon matters *only* of personal interest." 461 U.S. at 147 (emphasis added). The court interpreted this statement to mean that an employee could speak only in one category or the other, *i.e.*, that if she speaks *as an employee* she cannot at the same time be speaking *as a public citizen*. Moreover, even if the employee speaks in both capacities, the court denies her First Amendment protection if the "main thrust" of the statement is made in her capacity as an employee. 6 F.3d at 755.

The court acknowledged that the subject matter of petitioner's speech — sexual harassment in a public workplace — was a matter of public concern, *id.* at 757, 755 n.7, a finding that is beyond dispute. Nevertheless, under its interpretation of *Connick*, the court held that petitioner's personal interest in the subject matter of her speech, as reflected in her failure to go public with her allegations, was sufficient to transform what otherwise was speech of public concern into speech of private concern. *Id.* at 755.[5] Moreover, it interpreted *Connick* as requiring it to discern the *primary* purpose of the speech.

The Seventh Circuit follows an identical interpretation of *Connick*. In *Callaway* v. *Hafeman*, 832 F.2d 414, 417 (7th Cir. 1987), the court held that a sexual harassment victim who sought to end the harassment, but to do so quietly, had no First Amendment protection for her complaints because

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[5] Even though the court acknowledged that speech does not lose its First Amendment protection simply because uttered in private, it appears to have given dispositive weight to petitioner's failure to publicize her plight. 6 F.3d at 755.

she was the victim of the harassment and did not seek to make the harassment public.[6] *Accord*, *Gray* v. *Lacke*, 885 F.2d 399 (7th Cir. 1989), *cert. denied*, 494 U.S. 1029 (1990) (complaints about sexual harassment by victim raise issues of only private concern).

The Second Circuit has recently reached the same conclusion, *i.e.*, that the "purpose" of speech can take away First Amendment protection from content that is of inherent public concern. In *Saulpaugh* v. *Monroe Community Hospital*, 4 F.3d 134 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1189 (1994), a public employee's supervisor conditioned her employment on her sleeping with him. When she refused and complained about his abuse, he retaliated against her. *Id.* at 139-40. The court held that

> "there is no indication that the plaintiff 'wanted to debate issues of sex discrimination,' that her suit sought 'relief against pervasive or systemic misconduct by a public agency or public officials,' or that her suit was 'part of an overall effort . . . to correct allegedly unlawful practices or bring them to public attention.'" *Id.* at 143.

Having found no evidence that the employee's complaints were aimed at stimulating a public debate, the court held them to be without First Amendment protection. *Id.*

Thus the Second and Seventh Circuits have now been joined by the Eleventh in holding that, even though the

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[6] *Callaway* distinguished *Connick*'s holding on the political coercion question by characterizing that speech as "unconnected with her immediate personal interest in opposing her own work transfer."

content or subject matter of a public employee's speech raises a matter of inherent public concern, *Connick* requires them to look at the form and context of that speech as well. More important, they view *Connick* as requiring them to remove First Amendment protection from that speech if its form and context suggest a personal purpose — such as ending unconstitutional harassment or discrimination directed at the employee herself.[7]

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[7] To be sure, not every decision that applies a full "content, form, and context" analysis to public employee speech on a matter of inherent public concern finds the speech to be unprotected.

For example, courts have held that men who complain of sex discrimination against women are protected because the content of the speech is of no personal consequence to the speaker. *See Marshall* v. *Allen*, 984 F.2d 787 (7th Cir. 1993) (speech by male employee in support of female victims of gender discrimination victims protected because he was not himself a victim of discrimination).

Others have held that, once discrimination has reached some unspecified level of pervasiveness in a public workplace, even the victims' complaints about it enjoy First Amendment protection. *E.g.*, *Auriemma* v. *Rice*, 910 F.2d 1449, 1460 (7th Cir. 1990) (en banc), *cert. denied*, 501 U.S. 1204 (1991) (speech by 18 white male officers complaining of demotion because of race was protected because it was not "run-of-the-mine single-plaintiff case"); *see also Saulpaugh*, 4 F.3d at 143 (distinguishing complaints about systemic sexual harassment from cases affecting only two employees). Those courts do not explain why sexual or racial harassment of a single employee as a condition of public employment does not offend the Constitution — and therefore the public — but harassment of five or ten does.

B. Other Circuits Hold That Speech Which Is Inherently of Public Concern Remains Protected No Matter What Its Form or Context.

In sharp contrast, other circuits have followed a completely opposite interpretation, holding that where the subject of the employee's speech is inherently of public concern, no examination of form or context need be made: The statement is entitled to First Amendment protection.

Illustrative is the First Circuit's decision in *O'Connor* v. *Steeves*, 994 F.2d 905 (1st Cir.), *cert. denied*, 114 S. Ct. 634 (1993). It cited the very same language from *Connick* that the Eleventh Circuit cited, (see p. 6-7 above), *i.e.*, that there is no First Amendment protection when "a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest." 461 U.S. at 147. But the court in *O'Connor* adopted the opposite interpretation from other courts:

> "Where a public employee speaks out on a topic which is clearly a legitimate matter of *inherent* concern to the electorate, the court may eschew further inquiry into the employee's motives as revealed by the 'form and context' of the expression." 994 F.2d at 913-14 (emphasis supplied).

Only where the employee's speech does not raise an issue of public concern *on the basis of its content alone* will the court conduct the broader examination into the form and context of the statement to determine whether it is nonetheless entitled to protection under the First Amendment. *Id.*

The Tenth Circuit has followed this same interpretation. *Woodward* v. *City of Worland*, 977 F.2d 1392, 1404 (10th Cir. 1992) ("because the substance of [Question 11 in *Connick*] related to important societal and constitutional interests, it was held to be speech pertaining to a matter of public concern even though the context of the speech was to redress a personal grievance").[8] Likewise, the District of Columbia Circuit follows the "content" approach, having found the content of a public employee's speech to be of public concern without analyzing either its form or its context. *See Hall* v. *Ford*, 856 F.2d 255 (D.C. Cir. 1988).[9]

III. THIS CASE PRESENTS AN IMPORTANT ISSUE OF BROAD PRACTICAL IMPORTANCE.

The law applied in the Second, Seventh and Eleventh Circuits is destructive of more than First Amendment free-

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[8] *Woodward* avoided ruling on the issue under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). 977 F.2d at 1404.

[9] The Third Circuit has taken an approach in the middle. While interpreting *Connick* as requiring a full "content, form, and context" analysis in every case, it has recognized that the Second and Seventh Circuits' focus on the purpose or motive of the speech at issue is inconsistent with *Connick* and *Rankin*. *Rode* v. *Dellarciprete*, 845 F.2d 1195, 1202 (3rd Cir. 1988) (to dismiss speech on racial animus as private "merely because [the employee] has a personal stake in the matter fetters public debate on an important issue because it muzzles an affected public employee from speaking out"); *Zamboni* v. *Stamler*, 847 F.2d 73 (3rd Cir.), *cert. denied*, 488 U.S. 899, 78 (1988) ("Were motivation rather than content dispositive, [*Connick*] would have had no reason to isolate the one question that was of public concern from all the others. Indeed, it is unlikely that any employee who lacks a personal interest in the subject that gives rise to the speech in question would file a lawsuit to vindicate his or her First Amendment rights").

doms; it is destructive of the nation's quest to rid public workplaces of sexual harassment and other discrimination. Under the standards adopted in those circuits, one who witnesses sexual harassment or other discrimination against a co-worker can complain about that conduct without fear of punishment for that speech. If the victim of the harassment complains, however, she can be punished with impunity. To put the issue in terms of the facts of *Connick*, had the employee there complained that she herself had been coerced into supporting a political candidate not of her choosing as a condition of state employment, these courts would hold that her speech raised no matter of public concern. Yet had she alleged that a co-worker had been coerced, her speech would raise a matter of public concern.

Constitutional proscriptions against political coercion or denial of equal protection never raise matters of solely private concern. They raise matters of inherently public concern. When a government official conditions non-exempt public employment on support of a political candidate, that official offends more than the affected employee. As this Court observed in *Connick*, he offends the public's interest in government service conditioned on merit rather than political loyalty. 461 U.S. at 149. Similarly, when a government official conditions public employment on provision of sexual favors or subjection to sexual or racial discrimination, he does not merely offend the victim of his discrimination. He offends both the public's interest in equal protection of the laws *and* its interest in government service based on merit.

Sexual harassment is widespread in public, as well as private, workplaces. *See, e.g.*, U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Government: An Update* (1988). It is, unfortunately, also widely unreported.

See, e.g., James Gruber, *How Women Handle Sexual Harassment: A Literature Review*, 74 Sociol. & Social Res. 3, 5 (1989) (reporting that fewer than ten percent of sexual harassment victims make formal complaints). So long as harassment goes unreported, it continues unchecked. Many public employers have established internal complaint procedures that encourage victims of harassment to come forward with their concerns informally. If allowed to function, these complaint procedures will increase reporting of harassment, speeding the process of eradicating sexual harassment from public workplaces. If public employees cannot use these procedures without fear of retaliation, both their First Amendment and Equal Protection rights will be violated.

There can be no question that the decision in this case would have come out exactly the opposite way if the case had been filed in the First Circuit or the District of Columbia. Nor is there any doubt that the Second and Seventh Circuits would have reached the same conclusion as the court below on the facts of this case. Thus, mere accident of residence determines whether a public employee who complains internally about unlawful discrimination against her is engaging in speech that is protected by the First Amendment.

More than a dozen appellate decisions have addressed public employee speech concerning constitutional or statutory violations by public officials — matters of inherent public

concern — in the last ten years.[10] Obviously a far greater number of such claims were unappealed or settled or even unfiled. This means that the disparity in the circuits is clearly a recurring and serious problem for public employees and must be corrected. Petitioner's case, which presents the question cleanly, is an appropriate vehicle for issuing that guidance.

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[10] *See Gonzalez* v. *Benavides*, 774 F.2d 1295, 1301 (5th Cir. 1985), *cert. denied* 475 U.S. 1140 (1986); *Wren* v. *Spurlock*, 798 F.2d 1313 (10th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987); *Callaway* v. *Hafeman*, 832 F.2d 414 (7th Cir. 1987); *Yatvin* v. *Madison Metropolitan School District*, 840 F.2d 412 (7th Cir. 1988); *Zamboni* v. *Stamler*, 847 F.2d 73 (3rd Cir.), *cert. denied*, 488 U.S. 899 (1988); *Brawner* v. *City of Richardson*, 855 F.2d 187 (5th Cir. 1988); *Hall* v. *Ford*, 856 F.2d 255 (D.C. Cir. 1988); *Johnston* v. *Harris County Flood Control District*, 869 F.2d 1565 (5th Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990); *Wulf* v. *City of Wichita*, 883 F.2d 842 (10th Cir. 1989); *Gray* v. *Lacke*, 885 F.2d 399 (7th Cir. 1989), *cert. denied*, 494 U.S. 1029 (1990); *Bryson* v. *City of Waycross*, 888 F.2d 1562 (11th Cir. 1989); *Breuer* v. *Hart*, 909 F.2d 1035 (7th Cir. 1990); *Auriemma* v. *Rice*, 910 F.2d 1449 (7th Cir. 1990) (en banc), *cert. denied*, 501 U.S. 1204 (1991); *Wilson* v. *UT Health Center*, 973 F.2d 1263, 1269 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1644 (1993); *Marshall* v. *Allen*, 984 F.2d 787 (7th Cir. 1993); *O'Connor* v. *Steeves*, 994 F.2d 905, 914 (1st Cir.), *cert. denied* 114 S. Ct. 634 (1993); *Saulpaugh* v. *Monroe Community Hospital*, 4 F.3d 134 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1189 (1994); *Morgan* v. *Ford*, 6 F.3d 750 (11th Cir. 1993).

CONCLUSION

For the reasons stated above, the Court should grant the petition for *certiorari.*

Respectfully submitted,

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